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Eliminating Circuit-Split Disparities in Federal Sentencing Under the Post-*Booker* Guidelines

ELLIOT EDWARDS*

Congress has lately been plagued by political polarization and gridlock.[1] The 112th and 113th Congresses, sitting from 2011 to 2013, have been the least productive in modern times.[2] By contrast, the U.S. Sentencing Commission, which is empowered to set the nation's sentencing policy, has been working diligently despite its sometimes politically sensitive task. In 2014, the Commission reduced sentences for nonviolent drug offenders and made that reduction retroactive; this change led to the release of over six thousand federal inmates in November 2015.[3] Such a politically dangerous move[4] could be unthinkable to the modern Congress.

The 2014 Term of the U.S. Supreme Court was an important one both for statutory interpretation and for federal sentencing law, which are the domains of Congress and the Commission, respectively. The Court decided two important cases in June 2015: *King v. Burwell*,[5] which upheld a key provision of the Patient Protection and Affordable Care Act; and *Johnson v. United States*,[6] which struck down as unconstitutionally vague a provision in the Armed Career Criminal Act. The former case, which will be discussed in more detail,[7] denotes a significant shift in the established practices of statutory interpretation.[8] And the Court's decision in *Johnson* has already

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* J.D. Candidate, 2017, Indiana University Maurer School of Law; B.M., 2014, Indiana University Jacobs School of Music. My deepest thanks to Professor Jessica Eaglin for introducing me to federal sentencing law and for all her support; to Ashley Eklund and Megan Binder for writing the Sherman Minton Moot Court Competition problem that inspired this Note; to Annie Xie, Emily Kile, and the rest of the *Indiana Law Journal* staff for working tirelessly to make this issue a reality; and to Mercedes Lysaker for her love, her patience, and her unending support. All mistakes are my own.

1. *See* SARAH BINDER, BROOKINGS INST., POLARIZED WE GOVERN? (2014), http://www.brookings.edu/~/media/research/files/papers/2014/05/27-polarized-we-govern-binder/brookingscepm_polarized_figreplacedtextrevtablerev.pdf [https://perma.cc/H2HM-37DU].

2. Philip Bump, *The 114th Congress Had a Pretty Productive Year (by Recent Standards, At Least)*, WASH. POST: THE FIX (Dec. 24, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/12/24/the-114th-congress-had-a-pretty-productive-year-by-recent-standards-at-least/ [https://perma.cc/7WHY-FLZ9]; *see also* Drew Desilver, *In Late Spurt of Activity, Congress Avoids 'Least Productive' Title*, PEW RESEARCH CENTER: FACT TANK (Dec. 29, 2014), http://www.pewresearch.org/fact-tank/2014/12/29/in-late-spurt-of-activity-congress-avoids-least-productive-title/ [https://perma.cc/E8Z4-D7ZT] (discussing the 114th Congress).

3. Erik Eckholm, *Thousands Start Life Anew with Early Prison Releases*, N.Y. TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/us/with-early-release-thousands-of-inmates-are-adjusting-to-freedom.html [https://perma.cc/5JYW-BH7U].

4. *See* Sarah Wheaton, *Has Obama Set Loose a New Willie Horton?*, POLITICO (Nov. 2, 2015, 5:41 PM), http://www.politico.com/story/2015/11/obama-prisoner-release-215431 [https://perma.cc/S6QQ-R2GC].

5. 135 S. Ct. 2480 (2015).

6. 135 S. Ct. 2551 (2015).

7. *See infra* Part II.A.

8. *See* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015).

prompted the Sentencing Commission, the body that sets federal sentencing policy, to revise the Sentencing Guidelines that correspond to the statute the Court invalidated.[9]

The "career-offender" guideline, which the Commission is currently revising, has been a notoriously difficult provision to interpret.[10] But the circuits have split over provisions in the Guidelines that are much less ambiguous.[11] Because the Guidelines are supposed to promote uniformity of sentencing throughout the federal courts, the disparities caused by these inconsistent interpretations, along with the potential disparities allowed by the appellate courts' broad authority to interpret the Guidelines, are unwarranted and must be addressed. As this Note will show, the political independence and procedural fluency of the Commission suggest a simple solution.

This Note will explore the rarely discussed consequences that result when courts of appeals freely interpret the Sentencing Guidelines. This Note will not address appellate review of sentences in general,[12] nor will it discuss disparities caused by trial courts.[13] Instead, the discussion below will address a very specific situation, namely when a court of appeals vacates a sentence because, in its estimation, the trial court misapplied the Guidelines. Part I will relate the history of the recent sentencing reform movement in America, noting particularly which bodies have the authority to decide sentencing policy. Part II will then analyze the interpretive power of the courts of appeals—the sole source of their ability to affect sentencing outcomes—and demonstrate the potential sentencing disparities that may result. Part III will contrast the Sentencing Commission with Congress, demonstrating some key procedural differences between the bodies. Finally, Part IV will propose that courts adopt a strictly textualist interpretation of the Guidelines, justified by the procedural integrity of the Sentencing Commission, that would minimize intercircuit sentencing disparities and return discretion to its rightful possessors.

I. SEATS OF SENTENCING DISCRETION

The history of sentencing reform in America has been one of shifting discretion.[14] Before the Sentencing Reform Act was passed in 1984, the dominant purpose of

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9. Sentencing Guidelines for United States Courts, 81 Fed. Reg. 4741 (notice of submission of amendment given Jan. 27, 2016); Sentencing Guidelines for United States Courts, 80 Fed. Reg. 49,314 (notice of proposed amendment given Aug. 17, 2015); *U.S. Sentencing Commission Set To Act on Crimes of Violence*, FAMS. AGAINST MANDATORY MINIMUMS (Jan. 5, 2016), http://famm.org/u-s-sentencing-commission-set-to-act-on-crimes-of-violence/ [https://perma.cc/3V4D-4NXP].

10. *See* M. Jackson Jones, *Ten out of Eleven Federal Circuits Agree: No One Knows Whether Section 4B1.2 of the United States Sentencing Guidelines Covers Burglary of Commercial Structures*, 8 APPALACHIAN J.L. 59, 64–66 (2008).

11. *See infra* Part II.B.

12. *See, e.g.*, Note, *More Than a Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 HARV. L. REV. 951 (2014).

13. *See, e.g.*, Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. 1 (2010).

14. In this Note, the phrase "sentencing discretion" refers to an entity's legal authority to influence criminal sentences.

sentencing was rehabilitation—crime was treated as a disease that could be cured through prison time.[15] This was the age of "indeterminate" sentencing; trial judges had untrammeled authority to impose whatever sentence they saw fit, limited only by wide statutory margins.[16] Sentencing during this period was not subject to appellate review.[17] And, because of the parole system, few offenders served their full sentences.[18]

Offenders had few constitutional protections against judicial sentencing decisions during this period.[19] In *Williams v. New York*, a 1949 U.S. Supreme Court case, the defendant was convicted of first-degree murder, and the jury recommended life imprisonment.[20] The judge, considering hearsay evidence of thirty burglaries the defendant had apparently committed as well as his "morbid sexuality," rejected the jury's recommendation and sentenced Williams to death.[21] On appeal, Williams challenged the sentence on due-process grounds; he had received a death sentence based on inadmissible evidence and with no recognizable standard of proof.[22] The Supreme Court affirmed the trial court's sentence and demonstrated that judges need to use all available information about an offender to advance the then-modern goals of criminal punishment: "[r]eformation and rehabilitation of offenders."[23] Because out-of-court information is "[h]ighly relevant" to proper sentencing, the Court reasoned, the Due Process Clause should not be allowed to interfere with penological advances.[24]

By the 1970s, the indeterminate model had fallen under harsh attack from all sides.[25] Scholars and politicians began to argue that criminal "treatment" methods were ineffective at preventing recidivism or reforming inmates,[26] and the unlimited discretion enjoyed by trial judges seemed to invite totally arbitrary sentences[27] motivated in some cases by racial bias.[28] These problems sparked an era of

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15. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 695 (2010). Much of this discussion of sentencing history is drawn from Judge Gertner's article.

16. *Id.* at 696.

17. *Id.* at 695–96; *see also* Koon v. United States, 518 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence was, for all practical purposes, not reviewable on appeal.").

18. Gertner, *supra* note 15, at 696. An average federal inmate was paroled after serving only fifty-eight percent of her sentence. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 45 (2004).

19. *See* Williams v. New York, 337 U.S. 241, 251–52 (1949).

20. *Id.* at 242.

21. *Id.* at 244.

22. *Id.* at 245–46.

23. *Id.* at 248.

24. *Id.* at 247, 251.

25. *See* Gertner, *supra* note 15, at 698.

26. *See id.* For an influential review of studies about criminal rehabilitation, see Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INT., Spring 1974, at 22.

27. *See, e.g.*, MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1973) (criticizing judges' "unbridled power . . . to be arbitrary and discriminatory").

28. *See* Joseph C. Howard, *Racial Discrimination in Sentencing*, 59 JUDICATURE 121 (1975) (providing a contemporary account of the racial problems that prompted sentencing reform).

comprehensive sentencing reform that continues to this day.[29] The two subparts that follow will discuss the two landmark events in recent legal history that shifted the seat of federal sentencing discretion: Part I.A will describe the creation of the U.S. Sentencing Commission, and Part I.B will discuss a series of Supreme Court decisions that returned some discretion to trial judges.

A. The Sentencing Commission

After nearly a decade of trying,[30] Congress passed a comprehensive sentencing reform bill on October 12, 1984.[31] The Sentencing Reform Act of 1984[32] made several key reforms. First, retribution replaced rehabilitation as the primary purpose of sentencing.[33] Thus, the Act abolished federal parole boards that had previously released "reformed" inmates.[34] This change also meant that an offender would know at sentencing exactly how long her sentence would be.[35] The second and more controversial effect of the Act was to establish the U.S. Sentencing Commission and to direct the Commission to write the Sentencing Guidelines.[36] This Commission was to comprise several sentencing experts[37] who would be able to create fair sentencing standards without yielding to political pressures.[38]

After three years of heated debate, the Commission published the first U.S. Sentencing Guidelines Manual on November 1, 1987.[39] This sparked a period of constitutional attacks on the Guidelines and utter confusion over how they should be implemented.[40] The Supreme Court declared the Guidelines constitutional in *Mistretta v. United States*, which quieted the litigation.[41] Once the constitutional

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29. A bipartisan sentencing reform bill was introduced in the Senate on October 1, 2015. Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (as introduced in Senate, Oct. 1, 2015); *Senators Announce Bipartisan Sentencing Reform and Corrections Act*, U.S. SENATE COMMITTEE ON JUDICIARY (Oct. 1, 2015, 10:00 AM), http://www.judiciary.senate.gov/meetings/senators-announce-bipartisan-sentencing-reform-and-corrections-act [https://perma.cc/R2SB-T683].

30. For a detailed account of the legislative history of the Sentencing Reform Act and the creation of the Guidelines, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

31. U.S. SENTENCING COMM'N, *supra* note 18, at 5.

32. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C. (2012)).

33. Gertner, *supra* note 15, at 698.

34. U.S. SENTENCING COMM'N, *supra* note 18, at 11–12.

35. This concept is often called "truth in sentencing." *Id.*

36. Gertner, *supra* note 15, at 698–99.

37. *Id.* at 700.

38. *See id.* at 698.

39. U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (U.S. SENTENCING COMM'N 2015).

40. Carol P. Getty, *Twenty Years of Federal Criminal Sentencing*, 7 J. INST. JUST. & INT'L STUD. 117, 119 (2007).

41. 488 U.S. 361 (1989). *Mistretta* was an important case that generated quite a few case notes by law students; for a sample, see Julia L. Black, Note, *The Constitutionality of Federal Sentences Imposed Under the Sentencing Reform Act of 1984 After* Mistretta v. United States, 75 IOWA L. REV. 767 (1990); Arthur C. Leahy, Note, Mistretta v. United States*: Mistreating*

challenges were resolved, the Guidelines went into mandatory effect throughout the U.S. federal district courts.[42]

The Guidelines are essentially a mathematical formula that courts were required to use to calculate sentences.[43] Today, sentencing is a three-step process: First, the judge looks up the "base offense level" for the offender's crime of conviction.[44] Then she considers the offender's "actual conduct"—what the offender really did—and adds enhancements and reductions to the offense level accordingly.[45] She takes the final offense level along with a separately calculated "criminal history category" and, finally, finds the offender's sentencing range on the Guidelines Manual's chart.[46]

Under the original structure of the Guidelines, judges had the authority to "depart" from the calculated Guidelines range[47] if a particular offender presented extraordinary mitigating or aggravating factors at sentencing.[48] The Sentencing Commission describes these "atypical" cases that warrant departure as outside the "heartland" of circumstances the Guidelines are supposed to cover.[49] The facts of *Koon v. United States*, in which the Court set abuse of discretion as the standard of appellate review for departures,[50] provide a good example of such a departure. Stacey Koon and Laurence Powell, two Los Angeles police officers, were convicted in federal court of violating Rodney King's constitutional rights, and the judge sentenced each defendant to thirty months in prison.[51] This was a significant downward departure from the properly calculated Guidelines range, which was seventy to eighty-seven months.[52] The trial judge justified this departure based on such factors as the *victim's* conduct and the likelihood that Koon and Powell would be abused in prison.[53]

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the Separation of Powers Doctrine?, 27 SAN DIEGO L. REV. 209 (1990); Laura Leigh Taylor & J. Richard Neville, Note, Mistretta v. United States*: Upholding the Constitutionality of the Sentencing Guidelines*, 40 MERCER L. REV. 1429 (1989).

42. Taylor & Neville, *supra* note 41, at 1430.

43. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (U.S. SENTENCING COMM'N 2015) (instructions for calculating the Guidelines).

44. *Id.* § 1B1.1(a)(2).

45. *Id.* § 1B1.1(a)(3)–(5). The "real offense" standard was intended in part to reduce the sentencing discretion of *prosecutors*, who could otherwise control an offender's sentence by deciding to charge one crime but not another. Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT'G REP. 180, 182 (1999). *But see* Rakesh N. Kilaru, Comment, *Guidelines as Guidelines: Lessons from the History of Sentencing Reform*, 2 CHARLOTTE L. REV. 101, 127 n.159 (2010) ("[T]he pre-*Booker* guidelines may have increased prosecutorial discretion by permitting prosecutors to charge and prove a minor offense and then punish the defendant for conduct not proved to a jury beyond a reasonable doubt.").

46. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(6), (7) (U.S. SENTENCING COMM'N 2015).

47. Gertner, *supra* note 15, at 699.

48. Koon v. United States, 518 U.S. 81, 92–93 (1996).

49. *Id.* at 94.

50. *Id.* at 91.

51. *Id.* at 88–90; Seth Mydans, *Sympathetic Judges Gives Officers 2 1/2 Years in Rodney King Beating*, N.Y. TIMES, Aug. 5, 1993, at A1.

52. *Koon*, 518 U.S. at 89.

53. *Id.*

In 2003, Congress limited even this amount of discretion. The PROTECT Act abrogated the Court's decision in *Koon* by allowing courts of appeals to review departures de novo.[54] In 2005, when the Supreme Court ruled the Guidelines advisory, it in turn struck down that provision of the PROTECT Act, a provision that would only work if the Guidelines were mandatory.[55]

From their creation in 1987 until 2005, the Guidelines were mandatory, and sentencing discretion was concentrated in the Sentencing Commission. Congress managed its goal of reducing the extreme freedom possessed by judges in the indeterminate-sentencing era. But judges and scholars criticized the Guidelines system for being too harsh and too restrictive of the trial judges who are the most closely involved with real-life sentencing.[56] As the new millennium began, the Supreme Court reclaimed some discretion for the trial judge.

B. The Effects of Booker

The end of the age of mandatory Guidelines began in 2000, when the Supreme Court decided *Apprendi v. New Jersey*.[57] The Court held that, under the Sixth Amendment, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[58] As the Court made clear four years later in *Blakely v. Washington*, this statutory maximum is the maximum penalty the judge could impose without finding additional facts not included in the jury's verdict.[59] In *Blakely*, the defendant was sentenced under the state of Washington's determinate sentencing scheme, and the standard range for his crime of conviction, kidnapping with a firearm, was forty-nine to fifty-three months.[60] The trial judge, however, found that Blakely had acted with "deliberate cruelty" and sentenced him to ninety months in prison—a thirty-seven-month upward departure—based on evidence not proved to the jury.[61] The Court held that this violated *Apprendi*: because the judge could not have imposed a sentence longer than fifty-three months without additional facts, those facts had to be proved to a jury beyond a reasonable doubt.[62]

Blakely set the stage for the demise of the mandatory Guidelines.[63] Seven months later, the Supreme Court found that the Sentencing Guidelines were unconstitutional

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54. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(d)(2), 117 Stat. 650, 670, *invalidated by* United States v. Booker, 543 U.S. 220 (2005).

55. *Booker*, 543 U.S. at 259; *see infra* text accompanying note 73.

56. *See* Getty, *supra* note 40, at 119.

57. 530 U.S. 466 (2000).

58. *Id.* at 490.

59. 542 U.S. 296, 303–04 (2004).

60. *Id.* at 299.

61. *Id.* at 300.

62. *Id.* at 303–05.

63. *See* Rose Duffy, Comment, *The Return of Judicial Discretion*, 45 IDAHO L. REV. 223, 231 (2008); *see also Blakely*, 542 U.S. at 326 (O'Connor, J., dissenting) ("Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy.").

if mandatory in *United States v. Booker*.[64] Freddie Booker was convicted of possessing with intent to distribute at least fifty grams of crack cocaine; the prosecutor had shown the jury evidence that Booker had possessed 92.5 grams.[65] Under the Guidelines, the maximum period of incarceration Booker could have been sentenced to for that quantity was 262 months—twenty-one years, ten months.[66] At sentencing, however, the judge found by a preponderance of the evidence that Booker had actually possessed an additional 566 grams and that he was guilty of obstructing justice; in light of these findings, the judge calculated Booker's Guidelines range at thirty years to life in prison.[67] Booker challenged his sentence under *Blakely*, and the Supreme Court granted certiorari.

In an unusual move, the Court delivered two majority opinions; only Justice Ginsburg joined them both.[68] The first, written by Justice Stevens, found that the *Apprendi-Blakely* rule applies to the Guidelines: Booker's sentence did violate his Sixth Amendment rights.[69] Justice Breyer wrote the second opinion, which found that the best remedy for the Guidelines' constitutional problem was to sever and excise the statutory provision that made them binding on federal courts.[70] *Booker* made the Guidelines merely "advisory,"[71] so courts had to "take account of" the offender's correct Guidelines range, but they were not bound to follow it.[72] The Court also struck down a statute that directed courts of appeals to review departures from the Guidelines de novo.[73] After *Booker*, sentences are reviewed only for their "reasonableness."[74]

Thus, since *Booker*, a sentencing judge has broad sentencing power—as long as she lays out a reasonable basis for imposing a particular sentence, she is bound only by the statutory sentencing limits for the offense of conviction.[75] Not only may she depart from the Guidelines as she could when they were mandatory, but she may also "vary" from them by declaring that the calculated range does not serve the purposes of punishment.[76] The law concerning departures and variances is fairly complex and beyond the scope of this paper, but two points are especially relevant.

First, a court of appeals can vacate a sentence if it finds that the district court miscalculated the Guidelines range, which is considered "significant procedural error."[77] A sentence is usually considered procedurally unreasonable if the Guidelines

64. 543 U.S. 220 (2005).
65. *Id.* at 227.
66. *Id.*
67. *Id.*
68. *Id.* at 226 (Stevens, J., majority opinion); *id.* at 244 (Breyer, J., majority opinion).
69. *Id.* at 243–44 (Stevens, J., majority opinion).
70. *Id.* at 245 (Breyer, J., majority opinion).
71. *Id.* at 266.
72. *Id.* at 259.
73. *Id.* at 260–61.
74. *Id.* at 261.
75. *See* Kimbrough v. United States, 552 U.S. 85, 107 (2007) (noting that *Booker* brought "advisory Guidelines combined with appellate review for reasonableness").
76. "'Departure' . . . refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." Irizarry v. United States, 553 U.S. 708, 714 (2008). All other non-Guidelines sentences are called "variances." *Id.* at 715.
77. Gall v. United States, 552 U.S. 38, 51 (2007).

were miscalculated, even if the sentence actually imposed fell within the proper Guidelines range.[78] This is due to a concern about the "anchoring effect," a cognitive bias that causes people to be unduly influenced by the first number they encounter;[79] in the case of sentencing, this "anchor" is the Guidelines range.[80] Part II will demonstrate that the power of the courts of appeals to decide what a guideline means and to vacate sentences that do not comply with that meaning is not trivial.

Second, since *Booker*, the Supreme Court has held that a district judge's variance based solely on her disagreement with the policy judgments of the Sentencing Guidelines is not necessarily unreasonable.[81] In *Kimbrough v. United States*, the district judge disagreed with the Guidelines' 100-to-1 ratio between sentences for possessing crack and powder cocaine (the "crack/powder disparity").[82] The Court upheld the district judge's decision, stating that *Booker* had made the whole Guidelines Manual advisory.[83] A district court must use the Guidelines as "the starting point and the initial benchmark" of its sentence,[84] but it need not ultimately follow them.[85]

These developments indicate that there is a tense balance between two seats of sentencing discretion: the Sentencing Commission, whose Guidelines still carry procedural weight despite being advisory and whom Congress continues to direct to research and promulgate sentencing policy, and the federal district courts, who can freely vary from the Guidelines' instructions when sentencing. No other entities have the explicit authority to directly influence sentencing policy in the federal system.

II. INTERPRETIVE DISCRETION

Though the Sentencing Commission and trial judges exercise the only expressly delegated sentencing authority in the federal system, the federal courts of appeals can also influence sentences within their own circuits by interpreting specific provisions in the Guidelines. This appellate power serves a vital and legitimate purpose, even under the advisory Guidelines: a circuit court's interpretation of a guideline will ensure that all the district courts in the circuit apply that guideline consistently.[86]

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78. *See* United States v. Robinson, 714 F.3d 466, 467–68 (7th Cir. 2013) ("If . . . the two-level increase for distribution was error, [defendant] is entitled to be resentenced, because the increase in the guideline range may have influenced the sentence that the judge gave him.").

79. Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 495 (2014); *see also* Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines To Stay the Same in Light of* Gall, Kimbrough, *and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115, 125–26 (2008).

80. Exum, *supra* note 79, at 125.

81. Kimbrough v. United States, 552 U.S. 85, 108–10 (2007).

82. *See id.* at 91.

83. *Id.*

84. Gall v. United States, 552 U.S. 38, 49 (2007) (decided the same day as *Kimbrough*).

85. *Kimbrough*, 552 U.S at 91.

86. *See* United States v. Banuelos-Rodriguez, 215 F.3d 969, 979 (9th Cir. 2000) (en banc) (Pregerson, J., dissenting) ("[I]ntracircuit sentencing disparities . . . defeat the fundamental purpose of the Sentencing Guidelines: 'reasonable uniformity in sentencing' among federal

When a guideline's text is especially unclear, the need for consistency within a circuit is apparent.[87] Even if the circuits interpret ambiguous text differently, the Commission can resolve the ambiguity without worrying about a free-for-all among the federal district courts.

The Commission is in an unusually strong position to resolve such circuit conflicts.[88] While the U.S. Supreme Court is traditionally responsible for resolving circuit splits over the meaning of a statute,[89] it has recognized the Sentencing Commission's unique authority and responsibility to "review and revise" the Guidelines.[90] In *Braxton v. United States*, the Court chose not to resolve a circuit conflict because Congress had entrusted the Commission with the duty to "make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest."[91] Justice Scalia, writing for a unanimous bench, suggested that the Court should be "restrained and circumspect in using [its] certiorari power" to resolve circuit conflicts dealing with Guidelines issues.[92]

The Court has kept its promise. Though it has granted certiorari in several cases involving the Guidelines,[93] it has never answered an unsettled question about Guidelines interpretation.[94] Thus, the Commission is entirely responsible for fixing problems with how courts interpret the Guidelines; this is due in part to the Commission's

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districts." (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 3, policy statement (U.S. SENTENCING COMM'N 2015))).

87. One guideline that has defied consistent interpretation is section 4B1.2, which defines the term "crime of violence" as it is used in the Guidelines' career offender provision. Jones, *supra* note 10, at 65–66. According to the section, crimes of violence include offenses that "involve[] conduct that presents a serious potential risk of physical injury to another." U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (U.S. SENTENCING COMM'N 2015). The circuits are split, for example, on whether driving while intoxicated (DWI) is a crime of violence. *Compare* United States v. Templeton, 543 F.3d 378 (7th Cir. 2008) (finding that DWI is not a crime of violence), *with* United States v. Spudich, 510 F.3d 834 (8th Cir. 2008) (finding that DWI is a crime of violence). The Supreme Court recently struck down an identical residual clause in the Armed Career Criminals Act as unconstitutionally vague, Johnson v. United States, 135 S. Ct. 2551 (2015) (invalidating 18 U.S.C. § 924(e)(2)(B) (2012)), and the Sentencing Commission is in the process of amending section 4B1.2 to delete the clause entirely, Sentencing Guidelines for United States Courts, 80 Fed. Reg. 49,314 (proposed Aug. 17, 2015).

88. Braxton v. United States, 500 U.S. 344, 348 (1991).

89. *Id.* at 347–48 ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.").

90. *Id.* at 348 (quoting 28 U.S.C. § 994(o) (2012)).

91. *Id.*

92. *Id.*

93. These cases often involve the Constitution. *See, e.g.*, Peugh v. United States, 133 S. Ct. 2072 (2013) (Ex Post Facto clause); United States v. Booker, 543 U.S. 220 (2005) (Sixth Amendment jury-trial right); Mistretta v. United States, 488 U.S. 361 (1989) (separation of powers).

94. The Court has on one occasion granted certiorari in a Guidelines case and ruled that a circuit court's application of a guideline was incorrect. Salinas v. United States, 547 U.S. 188 (2006) (per curiam), *vacating* 142 F. App'x 830 (5th Cir. 2005). But the *Salinas* opinion,

"unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect."[95]

As a result of the Supreme Court's reticence and the Commission's deliberate procedures, the courts of appeals wield substantial power over how the Guidelines are applied in their circuits. Even when the text of a guideline is not ambiguous, appellate courts can use their interpretive power to influence sentencing policy.[96] When courts interpret the Guidelines, they often state axiomatically that they apply the rules of statutory interpretation,[97] so this power can be quite broad depending on a judge's preferred theory of interpretation. Part II.A will discuss major themes in modern statutory interpretation; Part II.B will examine three instances where courts of appeals seem to have exercised undue discretion in interpreting the Guidelines; and Part II.C will explain why the outcomes of those cases are undesirable in the current sentencing scheme.

A. Traditional Rules of Statutory Interpretation

A divide has long existed between judges who believe a statutory text has an objective meaning that must control its interpretation, broadly called "textualists," and those who believe that either the legislature's intent or the statute's purpose can control, broadly called "purposivists."[98] This schism has led to debates among scholars and judges about how judges ought to interpret statutes.[99]

Modern textualists believe that the only legitimate source of the meaning of a statute is its text.[100] This is true even when the text might appear to defeat the supposed purpose of the statute.[101] A major reason textualists choose to reject other evidence of statutory purpose is that the legislative process is easily subverted by party

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only two paragraphs long, notes that even the "Solicitor General acknowledge[d] that the Fifth Circuit incorrectly ruled for the United States." *Id.* at 188.

95. *Braxton*, 500 U.S. at 348 (emphasis omitted) (citing 28 U.S.C. § 994(u) (2012)).

96. *See* United States v. Hunn, 24 F.3d 994, 1000 (7th Cir. 1994) (Easterbrook, J., dissenting) (arguing strenuously that the majority's interpretation of the guideline at issue contradicted the provision's text).

97. *See, e.g.*, United States v. Hackman, 630 F.3d 1078, 1083 (8th Cir. 2011) ("We employ basic rules of statutory construction when interpreting the Guidelines . . . ."); United States v. Cross, 371 F.3d 176, 180 (4th Cir. 2004) ("Interpreting a guideline is no different than interpreting a statute; the standard rules of statutory construction apply."); United States v. Robinson, 94 F.3d 1325, 1328 (9th Cir. 1996) ("This Court applies the rules of statutory construction when interpreting the Sentencing Guidelines."); United States v. Rocha, 916 F.2d 219, 243 (5th Cir. 1990) ("The Sentencing Guidelines are subject to the rules of statutory construction.").

98. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 (1990). Eskridge and Frickey distinguish "purposivism" from "intentionalism," but the distinction is subtle and unnecessary in this discussion. *Id.*

99. *Id.* at 321.

100. John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 73 (2006).

101. *Id.*; *see also* King v. Burwell, 135 S. Ct. 2480, 2502 (2015) (Scalia, J., dissenting) ("Statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision.").

leadership and special-interest groups.[102] Furthermore, Professor (now Judge) Easterbrook points out that nearly every statute is the result of bargaining and compromise among legislators;[103] if a statutory outcome seems strange, it is likely a result of such a bargain.

Justice Scalia used this approach in his dissent in *King v. Burwell*.[104] That case involved the Patient Protection and Affordable Care Act's tax subsidies for certain citizens.[105] The statute provided a credit to certain taxpayers, provided they purchased health insurance from "an Exchange *established by the State*."[106] The Court held that in order for the statutory scheme to work, this phrase must also include Exchanges established by the federal government.[107] Scalia was incredulous—how could "established by the State" mean "established by the State or the federal government"?[108]

Justice Scalia argued that the plain language must trump any judicial divination of purpose.[109] He further questioned the majority's conviction that the textualist reading of the statute did not advance a reasonable motive.[110] In other words, just because the law did not operate the way the majority thought it should does not justify departing from the plain meaning of the text.[111]

The main theory opposing textualism, known as purposivism, was long characterized by a single Supreme Court decision, *Church of the Holy Trinity v. United States*,[112] and its famous rule that "a thing may be within the letter of the statute and yet not within the statute, because not within its *spirit*."[113] This was the dominant approach to statutory interpretation for nearly a century after *Holy Trinity* was decided.[114]

Purposivism is the interpretive theory adopted by *The Legal Process*, one of the most influential legal texts of the twentieth century.[115] Writing in 1958, Hart and Sacks lay out a two-step method for interpreting statutes: a court should first "[d]ecide what purpose *ought* to be attributed to the statute" and then "[i]nterpret the

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102. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540–41, 547–48 (1983).

103. *Id.* at 540.

104. 135 S. Ct. at 2496 (Scalia, J., dissenting).

105. *Id.* at 2485 (majority opinion).

106. *Id.* at 2487 (emphasis in original) (quoting 26 U.S.C. § 36B(b)–(c) (2012)).

107. *Id.* at 2496.

108. *Id.* at 2496 (Scalia, J., dissenting).

109. *Id.* at 2502.

110. *Id.* at 2504.

111. Professor Gluck notes that the petitioners also argued that the textualist reading was consistent with the purpose of the statute—a good example of a strange-looking bargain. Gluck, *supra* note 8, at 72–73.

112. 143 U.S. 457 (1892).

113. *Id.* at 459 (emphasis added).

114. John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113. For the perspective of a Justice from a past generation, see Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538–39 (1947).

115. *See* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS at li, li (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (tent. ed. 1958).

words of the statute . . . so as to carry out the purpose as best it can."[116] In other words, a judge should decide on the purpose of the statute *first* and make the text fit that meaning *second*, as long as she does not give the words "a meaning they will not bear."[117] To find this purpose, the court should not, as Hart and Sacks put it, "tak[e] account of all the short-run currents of political expedience that swirl around any legislative session";[118] instead, "[i]t should assume, unless the contrary unmistakably appears, that the legislature was made up of *reasonable persons pursuing reasonable purposes reasonably.*"[119]

Hints of this purpose-first approach can be found in Chief Justice Roberts' majority opinion in *King*.[120] The structure of the opinion is unusual: rather than discussing the text at the beginning, determining that it was ambiguous, and then proceeding to the purpose, which is the usual logical order of interpretation, Roberts began with a lengthy exposition of the Affordable Care Act's healthcare scheme.[121] He would use this "plan" to justify his interpretation of the phrase "established by the state" later in the opinion.[122] Thus the Court seemed to perform a version of the *Legal Process* two-step, starting with the statute's purpose before making the text fit.

A more modern rationale for advancing the legislative purpose is that it would be a waste of Congress's time to make it go back and fix its legislation's text when purpose is clear from other sources, such as legislative history.[123] This argument is based on the reality of congressional gridlock: Congress rarely acts to fix statutes after adverse rulings.[124] This principle of "legislative inertia" has even led Professor (now Judge) Guido Calabresi to propose that courts should be able to invalidate statutes when they have become outmoded just as courts can change common-law rules.[125]

Since the resurgence of textualism on the Court starting in the 1990s, however, *Holy Trinity* purposivism has fallen into disfavor.[126] Professor Gluck argues that *King* demonstrates a potential successor to purposivism for today's modern, complex Congress.[127] She posits that Congress does not draft statutes perfectly—how could it?—but that its legislation does have a "plan."[128] This approach is based on Congress's institutional inability to meticulously draft the kinds of very long and

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116. HART & SACKS, *supra* note 115, at 1374 (emphasis added).
117. *Id.*
118. *Id.* at 1378.
119. *Id.* (emphasis added).
120. King v. Burwell, 135 S. Ct. 2480 (2015).
121. *Id.* at 2485–87.
122. *Id.* at 2493.
123. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) ("[W]e do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it 'to take the time to revisit the matter' and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error." (quoting Smith v. Robinson, 468 U.S. 992, 1031 (1984) (Brennan, J., dissenting))).
124. *See* Gluck, *supra* note 8, at 107–08.
125. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 113–14 (1982).
126. Manning, *supra* note 114, at 125, 131.
127. Gluck, *supra* note 8, at 87.
128. *Id.*

complex bills that today's Congress is passing.[129] The Court's role in this context is "only to not 'negate' the plan."[130]

Judge Posner, responding to Professor Gluck, suggests that judges do not interpret statutes based on legal scholarship.[131] Posner instead says that judges are consciously or unconsciously influenced by "politics and consequences."[132] As a result, judges often consider background principles, such as political outcomes, common-law presumptions, and substantive policy values, when they look at statutes.[133] These principles derive not from the text but from the background legal landscape (e.g., the common law) that Congress is presumed to know.[134]

Judges often bring background principles from the common law and other sources to bear when interpreting statutes. These include the substantive political values Judge Posner describes,[135] as well as the so-called "canons of interpretation" that Karl Llewellyn long ago derided for being contradictory.[136] Canons fall into two main categories: linguistic and substantive.[137] Linguistic canons deal with the statute's text; these include *expressio unius est exclusio alterius*, the rule that the inclusion of certain items in a list excludes those not listed.[138] Substantive canons, on the other hand, deal with a statute's policy effects.[139] For example, some disfavored effects may be brought about only through a "clear statement" by the legislature.[140]

Judges have used these three sources of information—the statute's text, its purpose, and background principles—to interpret statutes for hundreds of years.[141] The rules of statutory interpretation have seeped into the common law, guiding courts and forming schools of thought about how interpretation ought to be done.

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129. *Id.* at 87–88.

130. *Id.* at 88.

131. Richard A. Posner, Response, *Comment on Professor Gluck's "Imperfect Statutes, Imperfect Courts,"* 129 HARV. L. REV. FORUM 11, 11, 13 (2015).

132. *Id.*

133. *See generally* WILLIAM D. POPKIN, MATERIALS ON LEGISLATION 338–428 (5th ed. 2009) (discussing "background considerations").

134. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (stating that, "by a benign fiction, [the Court] assume[s] Congress always has in mind" the statute's common-law background).

135. Posner, *supra* note 131, at 11–12.

136. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950); *see also* Michael Sinclair, *"Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," One to Seven*, 50 N.Y. L. SCH. L. REV. 919, 921 (2005–2006).

137. David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 927 (1992).

138. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805 & n.25 (1983).

139. Shapiro, *supra* note 137, at 934.

140. *Id.* at 940 ("Adopted by courts in pursuit of some explicitly stated policy objective, clear statement rules embody the view that the legislature can achieve a particular result only by *explicit* statement . . . ." (emphasis in original)).

141. *See* POPKIN, *supra* note 133, at 9–10.

B. Disparities Against the Text: Three Examples

When they interpret the Guidelines, courts do not always declare the text ambiguous before announcing an interpretation that seems to contradict that text. This Section will describe three examples of circuit conflicts in which some courts of appeals applied background principles while others stuck to the text.

1. "Express Threat of Death"

Section 2B3.1(b)(2)(F) of the 1993 Guidelines Manual provided that an offender convicted of bank robbery received a two-level enhancement "if an express threat of death was made." The commentary to that section contained an extensive definition of the phrase:

> An "express threat of death[]" . . . may be in the form of an oral or written statement, act, gesture, or combination thereof. For example, an oral or written demand using words such as "Give me the money or I will kill you", "Give me the money or I will pull the pin on the grenade I have in my pocket", "Give me the money or I will shoot you", "Give me your money or else (where the defendant draws his hand across his throat in a slashing motion)", or "Give me the money or you are dead" would constitute an express threat of death. The court should consider that the intent of the underlying provision is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, significantly greater fear than that necessary to constitute an element of the offense of robbery.[142]

This language caused a heated circuit split.[143] The majority of circuits followed the Commission's broad rule as stated in the commentary.[144] The Eleventh Circuit, by contrast, looked only at the text of the guideline, not the commentary, and held that "[t]he statement, 'I have a gun' . . . . may imply a threat to use the gun, but that does not constitute an express death threat."[145]

The Seventh Circuit's case on this issue is representative.[146] In *United States v. Hunn*, the defendant, Andrew Hunn, committed five bank robberies, and he repeatedly kept his hand inside his coat, leading the banks' tellers to believe he had a gun.[147]

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142. U.S. SENTENCING GUIDELINES MANUAL § 2B3.1 cmt. n.6 (U.S. SENTENCING COMM'N 1993) (amended 1997).

143. United States v. Alexander, 88 F.3d 427, 428–29 (6th Cir. 1996) (describing the circuit conflict).

144. *See, e.g.*, United States v. Murray, 65 F.3d 1161 (4th Cir. 1995); United States v. France, 57 F.3d 865 (9th Cir. 1995); United States v. Hunn, 24 F.3d 994 (7th Cir. 1994); United States v. Lambert, 995 F.2d 1006 (10th Cir. 1993); United States v. Smith, 973 F.2d 1374 (8th Cir. 1992).

145. United States v. Canzater, 994 F.2d 773, 775 (11th Cir. 1993) (per curiam).

146. *Hunn*, 24 F.3d 994.

147. *Id.* at 995.

In particular, Hunn robbed the final bank by

> hand[ing] a different teller a note stating, "Give me all the money now. I have a gun. No tricks, I'm watching." When this teller replied that Hunn must be joking, he insisted, "No, I mean it," and "Hurry up." The teller stated that Hunn was pointing something from inside his right coat pocket toward her during the robbery as if he had a hidden gun.[148]

The district court concluded that this behavior constituted an express death threat and assessed the two-level enhancement.[149]

The Seventh Circuit affirmed.[150] It rejected the Eleventh Circuit's approach and called it an "unnecessarily cramped" reading of the guideline.[151] The court also inaccurately characterized the Eleventh Circuit's interpretation as requiring speech as opposed to "sign-language or miming."[152] The court then analogized the commentary's definition to the crime of aggravated assault, which requires "communication of a threat that creates a reasonable apprehension of death or serious bodily harm."[153] Hunn's conduct was similar to a 1963 Illinois case in which the defendant committed assault with intent to murder by showing the outline of a gun through her coat pocket;[154] this similarity was enough for the Seventh Circuit to conclude that Hunn had made an "express threat of death."[155]

Judge Easterbrook, a staunch textualist,[156] dissented.[157] He reasoned that the Sentencing Commission distinguished between two different types of death threats —express and implied—and opted to create an enhancement only for express threats. "A literal reading of the guideline . . . is not 'cramped' but is the only way to ensure that the text serves its function."[158] He claimed that that, through its interpretation, the majority had read "express" out of the Guideline.[159]

With *United States v. Alexander*, the Sixth Circuit became the first to agree with

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148. *Id.*

149. *Id.* at 996.

150. *Id.* at 995.

151. *Id.* at 997.

152. *Id.* The Eleventh Circuit merely held that indicating that one has a gun "may imply a threat to use the gun, but that does not constitute an express death threat." United States v. Canzater, 994 F.2d 773, 775 (11th Cir. 1993). One can certainly express a death threat in pantomime, but, as Judge Easterbrook argues in his dissent in *Hunn*, it is logically incoherent to make an express threat by implication. *Hunn*, 24 F.3d at 1000 (Easterbrook, J., dissenting).

153. *Hunn*, 24 F.3d at 997 (majority opinion).

154. People v. Preis, 189 N.E.2d 254 (Ill. 1963). The Supreme Court of Illinois held that "[a]n assault may consist of using a gesture toward another so as to give him reasonable grounds to believe that the person using the gesture means to apply actual force to his person." *Id.* at 256.

155. *Hunn*, 24 F.3d at 997.

156. For Judge Easterbrook's own views on statutory interpretation, see Easterbrook, *supra* note 102.

157. *Hunn*, 24 F.3d. at 999 (Easterbrook, J., dissenting).

158. *Id.*

159. *Id.* at 1000.

the Eleventh Circuit's and Judge Easterbrook's reasoning.[160] In that case, the district judge ruled that "saying that I've got a bomb in my case and a gun certainly *implies* a threat of death to this Court."[161] The Sixth Circuit reversed[162] but went further than either of the earlier opinions. The court ruled that the commentary was actually inconsistent with the text of the guideline and thus was not binding.[163] In his opinion for the court, Judge Suhrheinrich characterized decisions such as the Seventh Circuit's as dealing with "direct implication[s] of death," but not express death threats.[164] In order to satisfy section 2B3.1(b)(2)(F), the court held, "a defendant's statement must distinctly and directly indicate that the defendant intends to kill or otherwise cause the death of the victim."[165] Otherwise, the word "express" loses all meaning, and the enhancement applies even when an offender makes an implied threat.[166] As four of the five examples given in the commentary do not "distinctly and directly" state a death threat, the court found that they are not authoritative —instead, the guideline's text controls.[167]

In 1997, facing this disagreement among the circuits, the Sentencing Commission amended section 2B3.1(b)(2)(F) and its commentary.[168] Amendment 552 deleted the word "express" from the guideline and amended the commentary to provide that "the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply."[169]

2. "Distribution" of Child Pornography

The circuits have more recently disagreed over an enhancement in the guideline concerning possession of child pornography. This enhancement, section 2G2.2(b)(3)(F), increases the offense level by two "[i]f the offense involved . . . [d]istribution other than distribution described in" other enhancements in the guideline.[170] The commentary defines distribution as

> any act, including possession with intent to distribute, production,

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160. 88 F.3d 427 (6th Cir. 1996). The court quotes extensively from Judge Easterbrook's dissent in *Hunn*. *Id.* at 430–31.

161. *Id.* at 428 (emphasis added).

162. *Id.*

163. *Id.* at 431. "[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Stinson v. United States, 508 U.S. 36, 38 (1993).

164. *Alexander*, 88 F.3d at 428–29.

165. *Id.* at 431 (citing United States v. Cadotte, 57 F.3d 661, 662 (1995) (Arnold, J., dissenting)).

166. *Id.*

167. *Id.* (citing Stinson v. United States, 508 U.S. 36 (1993)).

168. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 552 (U.S. SENTENCING COMM'N 2015).

169. *Id.*

170. Other distribution enhancements include "[d]istribution for pecuniary gain" and "[d]istribution to a minor." U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(3)(A), (C) (U.S. SENTENCING COMM'N 2015).

> transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.[171]

The distribution enhancement became effective in November 2000,[172] and the definition of "distribution" in substantially its current form was added in 2004.[173] Since then, the technology used in child pornography offenses has changed; today's offenders often use so-called peer-to-peer (P2P) file-sharing programs.[174] Some of these programs automatically upload the files that the user downloads, so that a user with limited technological understanding might unknowingly "distribute" files.[175] Some courts were hesitant to apply the guideline to offenders who did not know they were distributing because "strict liability is disfavored in the criminal context."[176] The circuits have interpreted the enhancement in three different ways: (1) the enhancement applies to any offender who distributes, knowingly or not,[177] (2) the enhancement applies unless the defendant can show "concrete evidence of ignorance,"[178] or (3) the enhancement applies only if the prosecution can prove knowledge.[179]

The Fifth,[180] Tenth,[181] and Eleventh[182] Circuits have each held that the text of the guideline and its commentary unambiguously do not contain a knowledge requirement. These cases rely on two key facts about the text. First, the guideline's language does not expressly mention any mens rea requirement.[183] The Eleventh Circuit, for

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171. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 cmt. n.1 (U.S. SENTENCING COMM'N 2015).

172. U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 35 (2009).

173. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 664 (U.S. SENTENCING COMM'N 2015). In 2009, the Commission added a single word (*transmission*) to the language of the definition. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 733 (U.S. SENTENCING COMM'N 2015).

174. *See generally* U.S. SENTENCING COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES 48–53 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf [https://perma.cc/4AYX-XBLN] (describing the "P2P" software that child-pornography offenders use).

175. *See* United States v. Robinson, 714 F.3d 466, 470 (7th Cir. 2013).

176. *Id.* at 468; *see* Staples v. United States, 511 U.S. 600, 605–06 (1994) (identifying a common-law rule that "some indication of congressional intent . . . is required to dispense with *mens rea* as an element of a crime").

177. *E.g.*, United States v. Ray, 704 F.3d 1307, 1311–12 (10th Cir. 2013).

178. United States v. Dodd, 598 F.3d 449, 452 (8th Cir. 2010) (emphasis omitted). This unique approach, applied strictly only in the Eighth Circuit, is beyond the scope of this paper.

179. *E.g.*, *Robinson*, 714 F.3d at 470.

180. United States v. Baker, 742 F.3d 618, 621–22 (5th Cir. 2014).

181. *Ray*, 704 F.3d at 1311–12.

182. United States v. Creel, 783 F.3d 1357, 1360 (11th Cir. 2015).

183. *Baker*, 742 F.3d at 621; *cf.* United States v. Ramos, 695 F.3d 1035, 1041 (10th Cir. 2012) (holding that the distribution enhancements do not require *intent* to distribute and basing that holding on the commentary's plain text).

instance, concluded that "[i]f the Sentencing Commission 'meant' to require knowledge, it would have 'said' as much."[184] Second, the commentary defines "[d]istribution to a minor" as "the *knowing* distribution to an individual who is a minor at the time of the offense."[185] The courts viewed this definition as evidence that the Commission knew how to draft a knowledge requirement "when they wanted to."[186]

In *United States v. Robinson*, the Seventh Circuit strenuously disagreed with those textualist conclusions.[187] Judge Posner's opinion for the court does not provide any textual arguments for the court's conclusion.[188] Instead, the court summarily rejected the Tenth Circuit's reasoning because of the common-law rule against strict liability in criminal statutes.[189] The court also rejected the argument about the commentary's "distribution to a minor" definition:

> Presumably the required knowledge is that the recipient is a minor, since in the absence of "knowing" it might well be assumed that liability is strict—that it's no defense that the minor looked like an adult—which was the traditional rule in statutory rape. To assume that by adding "knowing" to this definition the Sentencing Commission signaled that it's not required elsewhere *is a stretch*.[190]

Finally, Judge Posner stated that the court was "dealing with a 61-year-old man in very poor health . . . who on release will be at low risk of recidivating."[191]

Because of Congress's particular interest in the child-pornography guidelines,[192] the Commission has been slow to resolve this split. The Commission has issued a report to Congress regarding these guidelines, noting the circuit conflict,[193] but they have not yet proposed an amendment to fix the disparity.

3. (Proximate) Cause of Death

Section 2L1.1 of the Guidelines, which deals with smuggling of unlawful aliens, includes enhancements that apply "[i]f any person died or sustained bodily injury"

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184. *Creel*, 783 F.3d at 1360 (quoting U.S. v. Smith, 775 F.3d 1262, 1267 (11th Cir. 2014)).

185. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 cmt. n.1 (U.S. SENTENCING COMM'N 2015) (emphasis added).

186. *Ray*, 704 F.3d at 1313.

187. 714 F.3d 466, 468–69 (7th Cir. 2013).

188. *Id.*

189. *Id.* at 468 ("But strict liability is disfavored in the criminal context.").

190. *Id.* at 468–69 (emphasis added).

191. *Id.* at 468. Robinson was reported to be sixty-two in April 2012, according to a newspaper report about his original sentence. *Retiree Sentenced to Prison in Child Pornography Case*, EVANSVILLE COURIER & PRESS (Apr. 6, 2012), http://www.courierpress.com/news/crime/326659661.html [https://perma.cc/NN3K-KHZ4]. The article also reports that he used "file-sharing programs to download, view and share child pornography." *Id.*

192. The PROTECT Act of 2003 directly amended section 2G2.2. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. 108-21, § 401(i), 117 Stat. 650, 672–73.

193. U.S. SENTENCING COMM'N, *supra* note 174, at 33 nn.83–84.

in the course of the offense.[194] The circuits are divided over how directly the defendant must have caused the death or injury.[195] The Eighth[196] and Ninth[197] Circuits have held that the offender's conduct must proximately cause[198] the death; the Fifth,[199] Tenth,[200] and Eleventh[201] Circuits have held that the conduct need only be a but-for cause[202] of the death, which is an underlying requirement for all enhancements in the Sentencing Guidelines.[203] Because the enhancement's text contains no mention of causation at all, there can be no textualist justification for reading a heightened causation requirement into this enhancement.[204]

The facts of *United States v. Flores-Flores*[205] present a good example of when proximate cause is important. Defendant Flores-Flores was smuggling eleven unlawful aliens across the country in a van with only four seats.[206] During the journey, Flores was tired, so he asked one of the passengers, Anastacio Ramirez-Ortiz, to take the wheel.[207] Ramirez-Ortiz fell asleep while driving, and the van crashed; two aliens were killed in the accident.[208] The district court applied the enhancement, which was

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194. U.S. SENTENCING GUIDELINES MANUAL § 2L1.1(b)(7) (U.S. SENTENCING COMM'N 2015).

195. United States v. Ramos-Delgado, 763 F.3d 398, 401 & nn.2–3 (5th Cir. 2014) (describing the circuit split).

196. United States v. Flores-Flores, 356 F.3d 861, 862 (8th Cir. 2004).

197. United States v. Herrera-Rojas, 243 F.3d 1139, 1144 n.1 (9th Cir. 2001).

198. A defendant's action is the proximate cause of a harm if there was no other, more direct cause of that harm. *See* Michael S. Moore, *The Metaphysics of Causal Intervention*, 88 CALIF. L. REV. 827, 828 (2000).

199. *Ramos-Delgado*, 763 F.3d at 401.

200. United States v. Cardena-Garcia, 362 F.3d 663, 666 (10th Cir. 2004).

201. United States v. Zaldivar, 615 F.3d 1346, 1351 (11th Cir. 2010).

202. Justice Scalia recently illustrated "but-for" causation with baseball:

> Consider a baseball game in which the visiting team's leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run. This is so because it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter.

Burrage v. United States, 134 S. Ct. 881, 888 (2014).

203. As a general rule, a sentencing judge should consider "all harm that *resulted from*" the offender's conduct when applying the Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(3) (U.S. SENTENCING COMM'N 2015) (emphasis added). The U.S. Supreme Court has held that the phrase "resulted from" means only but-for causation. *Burrage*, 134 S. Ct. at 887–88.

204. *Ramos-Delgado*, 763 F.3d at 401.

205. 356 F.3d 861 (8th Cir. 2004).

206. *Id.* at 862.

207. Brief for Appellant at 10, *Flores-Flores*, 356 F.3d 861 (No. 03-3103), 2003 WL 23005404 at *10.

208. *Flores-Flores*, 356 F.3d at 862.

eight levels at the time.[209] Flores objected, arguing that he did nothing to proximately cause the aliens' deaths.[210]

The Eighth Circuit ultimately decided that Flores did proximately cause the deaths because he was transporting far more people in the van than it could hold.[211] The court noted, however, that "[t]he negligence of Ramirez-Ortiz was not an intervening cause relieving Flores of responsibility."[212] This dictum suggests that, in the Eighth Circuit, an intervening cause *could* render the enhancement inapplicable to a defendant because the enhancement requires proximate cause.[213] The Ninth Circuit described a similar requirement in a footnote: "We assume . . . that for [subsection (b)(7)] to apply, the relevant death or injury must be *causally connected* to dangerous conditions created by the unlawful conduct . . . ."[214]

As other circuits have noted, the guideline's language does not expressly require any specific type of causation.[215] The common law contains a presumption that proximate cause is an element of any crime that requires a certain result.[216] This rule is certainly well established for criminal statutes, and the Ninth Circuit has applied it to the statutory offense of transporting unlawful aliens resulting in death.[217] But courts that use the rule are departing from the four corners of the text of the statute (or guideline) and applying a common-law rule.[218]

The Fifth Circuit recognized the circuit split and agreed with the textualist courts that "[t]he guideline contains no causation requirement and [the court has] no license to impose one."[219] In *United States v. Ramos-Delgado*, the court looked instead to section 1B1.3, which describes in general the conduct a judge may consider when applying the Guidelines.[220] Subsection (a)(3) directs a judge to consider "all harm that resulted from the acts and omissions" of the offender made during the offense conduct.[221] The court held that the phrase "resulted from" means but-for, not proximate, causation.[222]

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209. *Id.*; U.S. SENTENCING GUIDELINES MANUAL § 2L1.1(b)(6)(4) (U.S. SENTENCING COMM'N 2002) (providing the eight-level enhancement in effect in February 2003 when the accident occurred). Besides the magnitude of the enhancement, the provision has not substantively changed since 2002. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.1(b)(7)(D) (U.S. SENTENCING COMM'N 2015).

210. *Flores-Flores*, 356 F.3d at 862.

211. *Id.* at 862–63.

212. *Id.* at 863.

213. *See* Moore, *supra* note 198, at 831.

214. United States v. Herrera-Rojas, 243 F.3d 1139, 1144 n.1 (9th Cir. 2001) (emphasis added).

215. *E.g.*, United States v. Ramos-Delgado, 763 F.3d 398, 401 (5th Cir. 2014).

216. United States v. Pineda-Doval, 614 F.3d 1019, 1026–27 (9th Cir. 2010).

217. *Id.* at 1027–28.

218. *See supra* Part II.A.

219. *Ramos-Delgado*, 763 F.3d at 401 (quoting United States v. Cardena-Garcia, 362 F.3d 663, 666 (10th Cir. 2004)).

220. *Id.*

221. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(3) (U.S. SENTENCING COMM'N 2015).

222. *Ramos-Delgado*, 763 F.3d at 401. The phrase "caused by" might impose a proximate cause requirement. *See Cardena-Garcia*, 362 F.3d at 666 ("Resulting in death and causing death are not equivalents.").

No court, applying either method, has actually ruled that a defendant's relevant conduct was the but-for cause, but not the proximate cause, of his victims' deaths.[223] This might happen if, for example, the "defendants' actions . . . merely sprained a passenger's hand, making him go to the hospital, and the hospital exploded from a gas leak."[224] According to the courts that use a textualist reading, subsection (b)(7) would apply to that defendant.[225]

The Sentencing Commission has not made revising this guideline a priority in any of the three amendment cycles since *Ramos-Delgado* was decided.[226] This is probably because a scenario that would implicate the split, like the example given above, seems so unlikely to occur.

C. The Problem with Appellate Sentencing Discretion

As the foregoing examples illustrate, the courts of appeals do not always follow the text of the Guidelines, even when the text is unambiguous. While this is consistent with the way some courts interpret statutes,[227] the differences between the Commission and Congress make this sort of interpretation harder to justify.[228]

Congress has empowered the Sentencing Commission to write the Guidelines and determine federal sentencing policy.[229] District courts may disagree with and disregard this policy, but they must do so transparently by stating a reason for variance.[230] Courts of appeals, however, have no such direct authority. Differences among the circuits lead to disparities simply because a guideline might apply to certain conduct in one jurisdiction and not the other.

Take as an example an offender who unknowingly distributes child pornography through a P2P file-sharing program. If he were convicted in Kansas, located in the Tenth Circuit, the court would apply the two-level enhancement in section 2G2.2(b)(3)(F).[231] On the other hand, if he were convicted in Illinois, part of the Seventh Circuit, he would not receive the enhancement, leading to a significantly shorter sentence.[232] This geographic or jurisdictional disparity is clearly unwarranted.

If this power of the appellate courts is left unchecked, the Commission's ability to use the words of the Guidelines[233] to set federal sentencing policy will be subject

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223. *See, e.g.*, United States v. Flores-Flores, 356 F.3d 861, 863 (8th Cir. 2004) (holding that defendant's actions did proximately cause deaths).

224. *Ramos-Delgado*, 763 F.3d at 402.

225. *Id.*

226. *See* Final Priorities for Amendment Cycle, 81 Fed. Reg. 58,004 (Aug. 24, 2016); Final Priorities for Amendment Cycle, 80 Fed. Reg. 48,957 (Aug. 14, 2015); Final Priorities for Amendment Cycle, 79 Fed. Reg. 49,378 (Aug. 20, 2014).

227. *See supra* Part II.A.

228. *See infra* Part III.

229. 28 U.S.C. § 994(a) (2012).

230. *See* Kimbrough v. United States, 552 U.S. 85, 108–09 (2007).

231. *See* United States v. Ray, 704 F.3d 1307, 1313 (10th Cir. 2013).

232. *See* United States v. Robinson, 714 F.3d 466, 468–69 (7th Cir. 2013).

233. *Cf.* Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1613 (2012) ("Whether or not Congress is always meticulous, if we don't *assume* that Congress picks its words with care, then Congress

to the common-law power of the courts of appeals. It is therefore important to discuss the proper use of the appellate power to interpret the Guidelines and to consider how to minimize these types of disparities.

III. THE GUIDELINES ARE NOT STATUTES

Judges often invoke Congress's complex lawmaking procedure as a reason to depart from the plain meaning of the text of a statute.[234] Indeed, Congress is a complicated body, and interpreting its words can be a challenging endeavor. But the Sentencing Commission is not, as Justice Scalia famously described, merely a "junior-varsity Congress."[235] The Commission's membership and its procedures practically ensure that the body means what it says in the Guidelines.[236] This Part will show the differences between the Commission and Congress and propose that the Guidelines should not be interpreted with all the freedom of statutory interpretation.

Congress designed the Sentencing Commission as a politically insulated, independent body of experts who would set sentencing policy without being influenced by public pressure.[237] The Commission currently comprises five voting members and two ex officio members who do not vote.[238] The voting Commissioners include three federal judges, a law professor, and a former Assistant U.S. Attorney,[239] and nearly everyone who has ever served on the Commission has been either a judge or a law professor.[240] These individuals are selected for their expertise in sentencing issues and their practical experience with sentencing.[241] The Commissioners also have to be appointed by the President and confirmed by the Senate, and no more than four

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won't be able to rely on words to specify what policies it wishes to adopt . . . ." (emphasis in original)).

234. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2492 (2015) ("Congress passed much of the Act using a complicated budgetary procedure known as 'reconciliation,' with limited opportunities for debate and amendment . . . .").

235. Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting) (referring to the Commission's lawmaking powers).

236. Justice Thomas lucidly described statutory textualism as the doctrine that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992).

237. Gertner, *supra* note 15, at 698.

238. *About the Commissioners*, U.S. SENT'G COMMISSION, http://www.ussc.gov/about/commissioners/about-commissioners [https://perma.cc/A2LX-NYYZ]; *see also Organization*, U.S. SENT'G COMMISSION, http://www.ussc.gov/about/who-we-are/organization [https://perma.cc/E5FW-Z82V] (noting that two of the seven voting positions on the Commission are vacant as of November 2016).

239. *About the Commissioners*, *supra* note 238.

240. *Former Commissioner Information*, U.S. SENT'G COMMISSION, http://www.ussc.gov/new/former-commissioner-information [https://perma.cc/978Q-3KT7]. Current Supreme Court Associate Justice Stephen Breyer was a founding member of the Sentencing Commission. *Id.*

241. For example, 28 U.S.C. § 991(a) (2012) mandates that "at least 3 of the members shall be Federal judges."

can be from a single party.[242] Finally, Commissioners can be removed "by the President only for neglect of duty or malfeasance in office or for other good cause shown."[243]

Members of Congress, by contrast, are politicians with political motivations. A recent survey of Congress showed that 331 out of 535 members consider themselves professional politicians, nearly sixty-two percent.[244] As a result, political pressures affect legislative decisions much more than members' expertise does. Senator Orrin Hatch once stated that he had long personally supported reducing sentences for drug crimes but that he was not able to act on that for political reasons.[245] Furthermore, while the Commissioners are experts on criminal law and sentencing, Congress's expertise is much more varied.[246] In the 114th Congress, at most sixty-four members have judicial or law enforcement experience.[247] This variety can promote a democratic and representational legislature, but it suggests that members of Congress may not necessarily understand everything they vote for. Thus, legislative mistakes are inevitable.[248]

Even if the Commission does make a textual mistake, as it might have done with the death-threat enhancement discussed earlier,[249] it can easily correct the mistake. Congress has directed the Commission to "periodically . . . review and revise" the Guidelines[250] and to submit proposed amendments to Congress by May 1 each year.[251] As a result, the Commission usually drafts amendments in yearly batches, publishing a new edition of the Guidelines Manual each November.[252]

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242. *Id.*

243. *Id.*

244. JENNIFER E. MANNING, CONG. RESEARCH SERV., R43869, MEMBERSHIP OF THE 114TH CONGRESS: A PROFILE 2 (2016), https://www.fas.org/sgp/crs/misc/R43869.pdf [https://perma.cc/9WHZ-7SEC]. The profile notes that "[m]ost Members list more than one profession." *Id.* at 3 n.8.

245. Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 43 (2006).

246. *See* MANNING, *supra* note 244, at 3–4.

247. This number includes members who describe themselves as judges, prosecutors, sheriffs, or police officers, but it does not account for possible double counting of members who reported more than one of these occupations. *Id.*

248. *Cf.* Gluck, *supra* note 8, at 101.

249. *See supra* Part II.B.1.

250. 28 U.S.C. § 994(o) (2012).

251. *Id.* § 994(p).

252. The Commission has released a new version of the Guidelines nearly every November since 1989. *Guidelines Manual Archives*, U.S. SENT'G COMMISSION, http://www.ussc.gov/guidelines-manual/guidelines-manual-archives [https://perma.cc/38L9-AX4E]. There have been only two exceptions. In 1999, the chair of the Commission resigned and the other commissioners' terms expired, leaving no voting commissioner to vote on amendments until November, long after the May 1 deadline. U.S. SENTENCING COMM'N, 1999 ANNUAL REPORT 7 (1999), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1999/ar99chap2.pdf [https://perma.cc/T6DT-ZRZX]. In 1996, the Commission "declared a moratorium on guideline amendments" to focus on a comprehensive simplification of the Guidelines. U.S. SENTENCING COMM'N, 1996 ANNUAL REPORT 7 (1999),

The Sentencing Commission goes through an amendment cycle each year.[253] In August, the Commission publishes its policy "priorities" for the year's batch of amendments.[254] These priorities are set based on the Commission's continual research of sentencing practices nationwide.[255] For example, the Commission's priorities for the 2013 cycle included "[r]eview, and possible amendment, of guidelines applicable to drug offenses, including possible consideration of amending the Drug Quantity Table . . . across drug types."[256] The amendment that this review produced ultimately released six thousand federal inmates in 2015.[257]

Next, the Commission solicits the advice of various interested parties in the criminal justice system.[258] The U.S. Probation System, the Bureau of Prisons, the Judicial Conference, the Criminal Division of the Department of Justice, and the Federal Public Defenders are all required by statute to comment on the Commission's proposals.[259] By January, the draft amendment language is ready, which the Commission publishes for public comment.[260]

Finally, at the end of April, the Commissioners vote to send the proposed amendments to Congress.[261] If Congress is silent, the amendments take effect on November 1 of that year.[262] To disapprove a proposed amendment, Congress must pass a law through both houses, and the President must sign it.[263] Congress has passed such a bill only once in the history of the Guidelines.[264]

Congress's procedure, memorialized in *Schoolhouse Rock*,[265] is incredibly involved[266] and often results in gridlock.[267] Even the constitutional requirements for

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http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1996/Chapter02.pdf [https://perma.cc/PG2N-5HH7].

253. U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS 25 (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf [https://perma.cc/VF6W-9QHK].

254. *Id.*

255. *See id.* at 27.

256. Notice of Final Priorities, 78 Fed. Reg. 51,820, 51,821 (Aug. 21, 2013).

257. *See supra* text accompanying note 3.

258. U.S. SENTENCING COMM'N, *supra* note 253, at 25; *see* 28 U.S.C. § 994(o) (2012) ("[T]he Commission shall consult with authorities on . . . various aspects of the Federal criminal justice system.").

259. 28 U.S.C. § 994(o).

260. U.S. SENTENCING COMM'N, *supra* note 253, at 25.

261. *Id.*

262. 28 U.S.C. § 994(p); U.S. SENTENCING COMM'N, *supra* note 253, at 25.

263. U.S. SENTENCING COMM'N, *supra* note 253, at 25.

264. *Id.* at 25, 38 n.183. On October 30, 1995, Congress and President Clinton disapproved two proposed amendments: one that would reduce the controversial 100-to-1 crack to powder cocaine weight ratio and another regarding sentences for money laundering. Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334; Statement on Signing Legislation Rejecting U.S. Sentencing Commission Recommendations, 2 PUB. PAPERS 1700 (Oct. 30, 1995).

265. *Schoolhouse Rock: I'm Just a Bill* (ABC television broadcast Feb. 5, 1977), http://abc.go.com/shows/schoolhouse-rock/episode-guide/season-01/24-im-just-a-bill [https://perma.cc/LTD9-TA9R].

266. *See* U.S. CONST. art. I.

267. *See* Gluck, *supra* note 8, at 107–08.

passing a bill are stringent: a bill must pass both houses of Congress and be signed by the President.[268] Furthermore, a complex system of committees and subcommittees can prevent a bill from ever reaching a floor vote,[269] and congressional leadership can exert a surprising amount of influence on voting outcomes through such seemingly benign powers as the right to set the day's agenda.[270]

The Commission's fluent procedure means that it can correct its mistakes. When the circuit split developed over the "express threat" enhancement described above, the Commission amended that guideline to delete the word "express."[271] Though that amendment took four years from the time the disagreement started,[272] that is relatively fast considering the amount of research the Commission does. Therefore, the Commission does not need the courts to fix perceived errors in the text of the Guidelines, even if Congress does.[273]

IV. STRICT TEXTUALISM

A strictly textualist interpretation of an unambiguous provision—or of the unambiguous commentary to an unclear provision[274]—is the best way to interpret the Guidelines. There are several reasons for this argument. First, strict textualism, unadorned by common-law presumptions or policy-based canons, is the method of interpretation least susceptible to judicial manipulation. Second, strict interpretation will encourage the Sentencing Commission to be meticulous when drafting the Guidelines in the first place[275] and will signal to the Commission when they have drafted a guideline incorrectly without creating the potential for unwarranted disparities caused by a circuit split.

Courts must therefore be careful not to read into the Guidelines background principles from the common law or policy considerations.[276] While many of these considerations make sense for actual statutes, to which they applied at common law, they should not apply to the Guidelines, which are a novel kind of text that only emerged in the last thirty years. Furthermore, judicial use of policy considerations undermines the Sentencing Commission's role in setting sentencing policy for the United States.[277] To be sure, some of that discretion was transferred to district courts

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268. U.S. CONST. art. I, § 7.

269. *See* POPKIN, *supra* note 133, at 500–01.

270. Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 564–65 (1977).

271. *See supra* Part II.B.1.

272. *United States v. Canzater*, the Eleventh Circuit case that used a textualist reading, was decided in July 1993, 994 F.2d 773 (11th Cir. 1993); the Commission's amendment became effective on November 1, 1997, United States v. Arevalo, 242 F.3d 925, 927 (10th Cir. 2001) (describing amendment).

273. *See supra* note 123 and accompanying text.

274. *See* Stinson v. United States, 508 U.S. 36, 45 (1993).

275. *Cf.* Scalia & Manning, *supra* note 233, at 1616 ("If legislators didn't look up the materials needed to define a technical term, they should have—because that's the meaning the persons subject to the law will understand.").

276. *See supra* Part II.A.

277. *See* 28 U.S.C. 994(a) (2012).

by the *Booker* decision, but none besides the ability to vacate an "unreasonable" sentence was ever assigned to courts of appeals;[278] those courts can only affect sentences by interpreting the Guidelines.

The two sections below suggest two ways[279] to solve this unwarranted disparity. The first would be imposed on courts by the Commission; the second, the courts must adopt themselves.

A. An Interpretive Guideline

The Sentencing Commission can directly articulate a preferred method of interpretation within the Guidelines Manual itself. There is already plenty of information in the Guidelines about their application; for example, the commentary to section 1B1.1 contains a list of general definitions that control the entire Manual.[280] The Commission could insert the following language into that section:

> The guidelines shall be interpreted according to their plain language when it is unambiguous and according to the plain language of the commentary when the corresponding guideline is ambiguous. No guideline shall be interpreted to have any implied meaning, and substantive canons of statutory interpretation do not apply to unambiguous guidelines.

This would be a difficult directive to ignore, both for parties and for judges, and it would discourage judges from applying substantive considerations that they admit are not clearly part of the text.[281]

But courts have long resisted legislative attempts to control statutory interpretation;[282] there is no reason to believe that courts will treat similar attempts by the Sentencing Commission differently. Professor Gluck describes a Connecticut statute that prohibited judges from considering "extratextual evidence" when the text is unambiguous and notes that the Connecticut Supreme Court has strongly resisted the effect of the statute.[283] Indeed, that court has found ambiguity in a statute simply because the litigants disputed the statute's meaning.[284]

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278. United States v. Booker, 543 U.S. 220, 261 (2005) (Breyer, J., majority opinion).

279. This Note deals with only those guidelines that have facially unambiguous texts. The solutions do not apply when a judge must choose between two different meanings of a word. For an interesting solution for interpreting truly ambiguous guidelines, see James W. Harlow, Comment, *Does the Calculation Matter? The Federal Sentencing Guidelines and the Doctrine of Alternate Variance Sentences*, 66 S.C. L. REV. 987 (2015), which describes a practice where the appellate court will refuse to review a challenged guideline interpretation if the district court's sentence properly considered statutory factors.

280. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. n.1 (U.S. SENTENCING COMM'N 2015).

281. *See* United States v. Robinson, 714 F.3d 466, 468 (7th Cir. 2013) (reversing because "strict liability is disfavored in the criminal context"); United States v. Herrera-Rojas, 243 F.3d 1139, 1144 n.1 (9th Cir. 2001) ("assum[ing]" that the guideline contains a causation requirement).

282. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1824–25 (2010).

283. *Id.* at 1794–95 (citing CONN. GEN. STAT. ANN. § 1-2z (West 2007)).

284. *Id.* at 1795–96, 1796 n.169 (listing cases); *see, e.g.*, State v. Jenkins, 954 A.2d 806,

Moreover, the *Braxton* decision means that the Supreme Court would probably deny certiorari to any case dealing with the interpretation of the Guidelines.[285] Without a meaningful right to appeal, prosecutors and defendants would have no way to correct a circuit court's decision to disregard the interpretive rule. As a result, such a rule would have no teeth.

B. Changing the Courts

Because any external rule for interpreting the Guidelines would be too-easily resisted by courts, this change must come from within the bench itself. Courts of appeals must recognize that any time two circuits interpret a guideline differently, they create "unwarranted sentencing disparities,"[286] and they cannot each simply blame the disparity on the other court's erroneous interpretation. Instead, circuit court judges should aspire to use a single method of interpretation—preferably, strict textualism.

Some judges may shudder at the notion of any stricture in statutory interpretation, as it is the court's responsibility to "say what the law is."[287] Or, because many of the common-law rules that apply to criminal statutes tend to benefit defendants, judges may face the morally uncomfortable task of affirming a sentence they find too harsh.[288] Judge Posner, writing for the Seventh Circuit in the *Robinson* case, was reluctant to sentence a "61-year-old man in very poor health" to ten years in prison.[289] Appellate courts may also be unwilling to give up what little discretion they have in the sentencing process.[290]

Consistent textual interpretation among the circuits would return sentencing discretion and the authority to decide sentencing policy to the parties that should rightfully possess it: the Sentencing Commission and district courts. It would affect the way prosecutors, who rely on the meaning of the Guidelines, make plea agreements, and whether defendants choose to appeal their sentences. Finally, and most importantly, it would eliminate the possibility of the unwarranted sentencing disparities described in Part II.B.

If the Sentencing Commission realizes that the text of a guideline does not adequately convey its purpose, it can easily amend the provision to make it clearer. This is what the Commission did for the "express threat of death" guideline—here, the

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812 (Conn. 2008).

285. *See* Braxton v. United States, 500 U.S. 344, 348 (1991); *see also supra* notes 93–94.

286. 18 U.S.C. § 3553(a)(6) (2012).

287. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

288. This is a position federal district judges find themselves in every day when they must apply mandatory minimum sentences. *See, e.g.*, United States v. Dossie, 851 F. Supp. 2d 478, 478 (E.D.N.Y. 2012) ("This case illustrates how mandatory minimum sentences in drug cases . . . mandate unjust sentences.").

289. United States v. Robinson, 714 F.3d 466, 467–68 (7th Cir. 2013).

290. *Booker* and its progeny represent the judiciary's reclamation of some of its former sentencing discretion from the Sentencing Commission. *See* D. Michael Fisher, *Still in Balance? Federal District Court Discretion and Appellate Review Six Years After* Booker, 49 DUQ. L. REV. 641, 643 (2011).

solution would be the same, but there would not be a circuit split to create the disparities seen in that example.[291]

CONCLUSION

As the history of sentencing reform has shown, substantive sentencing decisions are properly made only by the Sentencing Commission and trial courts. The Commission derives its authority from the Sentencing Reform Act of 1984, with which Congress significantly reduced judicial discretion at sentencing. When the Supreme Court rendered the Guidelines advisory in *Booker*, trial judges reclaimed much of their former discretion, but the Commission still had a say in sentencing policy, however weak.

The federal courts of appeals were never empowered to make sentencing policy. But the federal appellate bench has enough discretion to influence policy simply by interpreting the Sentencing Guidelines. When different courts interpret a provision of the Guidelines differently, sentencing disparities can result among the circuits, and this threatens the principle of uniform sentencing that underlies the modern sentencing-reform movement. Disparities caused by interpretation are especially unwarranted when they contradict the unambiguous language that the Commission uses in the Guidelines.

Uniformity of sentencing can be preserved most effectively with uniformity of interpretation among the federal courts of appeals. While there are many ways to interpret statutes, courts can eliminate disparities by deciding on a single method when they consider the Guidelines. Justifications for deviating from the unambiguous text of a statute, such as procedural efficiency or common-law principles, do not apply to the Guidelines because of the Sentencing Commission's unique composition and procedure.

Thus, the method most conducive to uniformity, and the only method that can preserve the Commission's role in setting the nation's sentencing policy, is strict textualism. This approach is easy to justify because it defers substantially to the Commission's ability to express its policy decisions in words and to fix its own mistakes, as it has done by recently reducing the Guidelines' sentences for drug offenses. If a textualist reading of the Guidelines is adopted throughout the federal circuits, the Commission can continue to effectively produce advisory sentencing policy for the trial courts, and courts of appeals can save their interpretive power for the truly difficult sentencing cases.

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291. *See supra* Part II.B.1.